No. 11097

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant.

vs.

WALTER LUBINSKI,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF APPELLEE LUBINSKI

SAM L. LEVINSON
Proctor for Appellee.

1602 Northern Life Tower
Seattle 1, Washington.

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The question involved, being one of fact, the statement of the case is given in detail.

APPELLEE'S STATEMENT OF THE CASE

A.

ON THE QUESTION OF NEGLIGENCE*

This is an action for damages brought by the appellee, a seaman on the S.S. GEORGE FLAVEL, because of

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* All emphasis in quotations, unless otherwise indicated, is supplied. References in (. . .) are to pages in Apostles on Appeal, unless otherwise indicated.

damages sustained, resulting in the loss of the sight of his left eye, by reason of the contact with escaping gas and fumes from a smoke bomb negligently stowed in the vessel's forepeak.

Appellee, Lubinski, a merchant seaman, joined the S.S. GEORGE FLAVEL as a boatswain at San Francisco in June, 1943. The S.S. GEORGE FLAVEL was a Liberty type vessel, and was operated by the appellant United States of America with the Alaska Steamship Company, as general agent. The vessel was manned by civilian merchant officers and crew, and was under the command of Captain Charles N. Goodwin (233). The cargo consisted of approximately 75% ammunition and military equipment, the balance being fuel and general impedimentia (234).

With this cargo were included certain smoke or signal bombs, part of the equipment of the landing barges which were stowed on the deck (235). Such bombs are ordinarily stowed in the life boats (302), and the bombs involved in this proceeding, which were part of the landing barge equipment, should have been stowed in the landing barges (302), which were then stowed on deck (275).

A considerable time after the vessel left San Francisco, and was in Alaskan waters (277), the mate, Kris-

tiensen, observing the smoke bombs on the deck (276) directed the crew to stow them in the forepeak of the vessel (279, 298, 302). The stowage of the smoke bombs in the forepeak of the vessel occurred with the direct knowledge and approval of the master (236).

The forepeak was open and members of the crew had access thereto (111, 236, 298). Normally the forepeak contained only the boatswain's and ship's supplies (53, 371,) and the men were constantly going in and out of the forepeak for that purpose (246, 298). The customary practice on merchant vessels prohibits the stowage of combustible materials in the forepeak where men are required to go for tools and equipment. Customarily, the proper procedure requires that such material be stowed in fireproof lockers or in a space where there is adequate provision to extinguish a fire, or to confine it if a fire occurs (53, 54, 55, 75, 141, 142, 144). A Liberty vessel such as the S.S. GEORGE FLAVEL has a steam smothering system in the holds, but there is no such system in the forepeak (55).

All of the testimony was to the effect that it was the primary responsibility of the ship's officers to see that the cargo was properly stowed with relation to the safety of the vessel and the crew (75, 142, 145, 246, 247, 249, 296, 371).

There is no dispute that the smoke bombs were placed in the forepeak at the order of the first mate and with the knowledge and approval of the master.

Not only was the stowage of smoke bombs in the forepeak of the vessel contrary to the customary and safe practice with relation to the stowage of combustible material, but this was directly contrary to Coast Guard regulations, which were in effect at that time, relating to the stowage of ammunition and combustible material.

Exhibit 2, the Coast Guard Regulations, dated October 1, 1943, was offered but refused (99), although Exhibit 3, which is the Coast Guard Regulations dated October, 1942, was offered and admitted (99). Appellant's brief, page 22, erroneously gives Exhibit 3 as bearing the date of October 1, 1943. The admitted exhibit was in effect at the time involved in this proceeding.

These regulations, Exhibit 3, were a comprehensive series promulgated for the safety of ship and crew in the handling and stowing of ammunition and dangerous cargo. These regulations define pyrotechnics, and provided for the stowage of such items at designated places. It is appelle's position that the definitions include smoke bombs. Stowage in the forepeak is permitted only if the forepeak contains no vessel's stores and can be closed off from traffic at sea (Ex. 3, Secs. 146.29-30-5, Aps. 101). These regulations also provide that it shall be the responsibility of the master to assign a deck officer to be in constant attendance at the

loading, to see that the provisions of these regulations were properly met.

The lower court found that negligence was clearly established in the stowage of the smoke bombs in the forepeak and that this was so, regardless of any regulations (9).

On July 15, 1943, the S.S. GEORGE FLAVEL was lying at Attu, Alaska. Appellee and other seamen were engaged in repairing gear in No. 2 hold. A seaman, one Uzdadinis, was sent into the forepeak to obtain some tools. The cases and material in the forepeak were tossed about in a disorderly condition (170), and while looking for the tools, Uzdadinis tossed aside a case containing smoke bombs (177, 179) and then returned to the hatch with the tools and proceeded to lower them with a line into the hold (173). Just about this time, a cry of "fire" was heard (172). Uzdadinis rushed forward and saw a great amount of orange smoke pouring out of the ventilator (173). No one was in the forepeak when Uzdadinis was there immediately before the fire (180). Although the amphibious crew had been using the forepeak for the purpose of overhauling some of their gear, they had finished their work about two weeks before the fire (112) and as a matter of fact, all of the troops were already off the vessel (219).

A general alarm was given and appellee, as first in command of the emergency squad in the absence of the first mate who was not there at that time (59), rushed to the scene of the fire, gave orders to break out the fire fighting equipment. Immediately aft of the fore peak was the magazine in which ammunition was stowed (6). The crew were worried over the situation (342) as a great aomunt of heat in the forepeak would blow up the entire ship (61). Lubinski donned a gas mask given him by Kristiensen (309), and was the first to go below into the smoke to search for the cause of the fire (309). Lubinski went down several times, and later one or two other members of the crew went down for the same purpose.

The smoke and fumes emerging from the forepeak were of a distinctive orange color (63, 193). Although the mask was supposed to fit snugly over the face, when Lubinski's mask was removed, evidence of the smoke fumes appeared on his face. The smoke left an orange powdery-like residue on his face, and this was apparent under his gas mask (195, 196, 197, 211, 343), and the fumes seemed to lay on Lubinski's face. When the mask was removed the first time, he was rushed over to the side to get some air as he was gagging (195, 212).

The fire was brought under control about forty-five minutes after the alarm was sounded and after great amounts of water were poured into the hold. Later, the

charred remains of the smoke bomb which caused the fire were found in the forepeak.

The vessel continued on from Attu and was part of the flotilla in the Kiska invasion, and on August 15th was lying near the beachhead, having begun discharge of soldiers and supplies. About ten o'clock in the morning, fire broke out in No. 3 hatch and the alarm sounded. Lubinski was in his room at the time (68), and he immediately proceeded to his station in the performance of his duties, donned a gas mask, and proceeded below in No. 3 hold. While there was smoke billowing out of the hold, it was sufficiently clear so that those standing on deck could generally see the ladder (69, 79, 227). As Lubinski started to emerge from the hold, and mount the ladder, he was struck in the face by the force of a deck hose which was being played on the fire below by two members of the steward's department. He came out of the hold soaking wet (175, 185), and was yelling to try to get the man to divert the stream away from him (200), as the force of the hose was full on his face and knocked aside the mask which he was wearing when he entered the hold (79, 200).

B.

On the Question of Appellee's Loss of Vision of His Left Eye as the Proximate Result of the Negligent Acts of Appellant.

All parties agreed that at the time of the trial, the vision of Lubinski's left eye was permanently destroyed.

At the time Lubinski joined the vessel, he was twenty-nine years of age and in perfect health (83). Approximately two months prior to his joining the S.S. George Flavel, his eyes were examined for the American President Lines and were declared perfect (84). He had never had trouble with his eyes. He had also had his eyes examined in 1941 or 1942, when he sought to join a vessel of the Moore-McCormick Lines, and they were again pronounced all right (89). In the very brief cross-examination of Lubinski by proctors for appellant United States of America, it was brought out that Lubinski had had frequent blood tests, between ten and fifteen, and all were negative (161). Lubinski was called on rebuttal to testify as to specific illnesses or diseases suggested by the various doctors as a possible cause for the loss of sight, and specifically testified that he had never had syphilis, sinus trouble, trouble with his teeth, rheumatism, that he had had between fifteen and twenty blood tests since 1935 with negative results, that he had had x-rays taken of his

body for the purpose of determining possible disease with negative results (520), and that never had any disease or illness other than a localized soft chancre, the same as a pimple, and an appendectomy (521).

This action was started on May 19, 1944 (8). Prior thereto, a statement giving the substance of his claim was filed by Lubinski on November 13, 1943, with the office of John Black, the insurance lawyer (163), and at the request of John Black's office, Lubinski was examined by Dr. Otto Barkan on November 26, 1943 (396), who submitted a written report to Mr. Black (403), and whose purpose was to set forth his views relating to the injury of the eye and the exposure to the fumes (403). On the 2nd day of March, 1944, a formal claim in writing was made with the appellant United States of America (5), and his oral discovery deposition was taken on the 20th of May, 1944. The case came on for trial January, 1945. No evidence was offered contradicting or challenging appellee's statement that he was in perfect health when he joined the vessel.

When Lubinski came up from the forepeak the first time, after he had gone below to find the cause of the fire (66), his clothes were covered with an orange residue of the smoke. Lubinski noticed it on the bare parts of his face and neck, and it burned his eyes very badly (66). Immediately after the occurrence of the fire, he

reported to the doctor, who washed his eyes out (67). He thereafter went below and did not turn to again until one o'clock the following morning, and before turning to, he felt very sick. Five or six days later, both of his eyelids were very badly swollen, which condition continued for two or three days (67). His left eye began to bother him. It was aching and getting very sore (68), like a toothache. Although the doctor on the ship treated the eye every day by washing his eye and putting salve on it (68), it grew steadily worse and was badly inflamed. During the eight or nine days following the incident of the fire in Kiska on August 15, 1943, Lubinski was in pretty bad shape (80), and the doctor was giving him hypos to ease the pain in his eye.

Upon arrival of the vessel at Adak, he was sent ashore to the navy hospital by the master of the vessel, for the purpose of consulting Dr. Kaven, an eye specialist (503). Dr. Kaven, at that time, found that there were keratitic deposits on the posterior cornea surface and the iris appeared muddy (491, 492).

Lubinski returned to the vessel and was again examined by an eye specialist upon the arrival of the vessel in Honolulu (81), and was then advised to return to the United States for treatment. The vessel arrived in Seattle about September 23, 1943, and from Seattle Lubinski went to his home in San Francisco,

and thence to Salt Lake City to consult his own physician. The latter advised him to return to San Francisco to the Marine Hospital for treatment, which he did (82).

Lubinski was an in patient at the Marine Hospital for three weeks, and an out patient for four months to the 9th day of February, 1944. During his in patient treatment, he received a complete general physical check-up, x-ray of his lungs, and prostate and massages and complete tests (83). His complete hospital record showing these examinations were filed in the proceeding by the appellant United States of America (477), and nothing appears therein, or was called to the court's attention by appellant, that would indicate that Lubinski ever suffered or then suffered from any systemic disease or illness.

Appellee's testimony as to his condition, and the effect of the fumes were amply corroborated by other members of the crew. Kenney testified (343) that when Lubinski came out of the hold, the orange powdery-like residue from the fumes was on his face under the gas mask; that these fumes burned Kenney's throat and his eyes were burning. Kenney knew that Lubinski had trouble with his eye immediately following the fire (345), and his own eyes and throat burned for several hours after the fire. A sailor named "Smokey"

complained about his eyes for two or three weeks after the fire (345).

Uzdadinis testified Lubinski complained about his eyes a day or two after the fire (176, 186), and that some other person on the ship had trouble with his eyes (182). Although Uzdadinis smelled the gas for only a second as it came out of the ventilator, and while he was in the open air, he felt it in his throat (183). According to this witness, it was obvious that Lubinski was having trouble with his eye (188).

Corvia testified that when Lubinski came up he took his gas mask off to get some air, and at that time the smoke was all over his face and Lubinski was rushed over to the side to get some air (195). At that time Lubinski complained how his face and eyes burned and his eyes started to water and he was gagging (196, 212). Corvia himself went to see the doctor because he was gagging as a result of getting a mouthful of smoke (196). Where the fumes came into contact with Corvia, they burned and stung (202). At that time, Lubinski's eyes were bloodshot and very watery (197), and during the rest of the voyage his eyes were pretty bad, they were always bloodshot and he always had to have a handkerchief or a piece of rag or waste to his eyes because of their condition (198, 202, 224, 225). Lubinski complained that his eyes hurt him constantly (226), and they were in the same condition when he

eft the ship (226). For at least two weeks after the ncident of the forepeak fire, Lubinski went to the loctor at least twice a day (198).

The first mate, Kristiensen, also testified as to the ffect of smoke or fumes, stating that they had a terible smell and made him sick (287, 288), and that Luinski complained about his eyes (294, 295).

Appellee's loss of vision was due to an iritis in its everest form, called iridocyclitis, or an inflammation f the iris, resulting in adhesions between the iris and he lens of the eye. All of the doctors who testified greed that the cause of this condition was either exgenous, a cause outside of the eyeball, i. e., a blow or njury, or endogenous, a cause within the human sysem, some infection within the body, causing the inlammation (Dorman, 134, Barkan, 401, Morrow, 415, 21, 430, Schumacher, 491, Ziegler, 508, 509).

Two of the doctors testified in person before the ourt.

Dr. Dorman, who testified on behalf of Lubinski, is n eye specialist who has been certified by the Ameriian Board of Ophthalmology (113), who has studied n Vienna, and who is the eye physician for the Federal Vocational Rehabilitation Program and a member of he National Society for the Prevention of Blindness, who has given several courses in connection with the

eye to various organizations and students (114, 115, 134, 136). He examined Lubinski on two occasions, the first on March 29, 1944, and the second a day before the trial on January 8, 1945.

Dr. Morrow, called by the appellant United States of America, is a member of the Puget Sound Academy of Ophthalmology and chief consultant and ophthalmologist at the Marine Hospital at Seattle, and examined Lubinski on June 20, 1944 (406) at the request of the proctors of appellant United States of America.

The other doctors called by the appellant United States of America all testified by deposition. They were Dr. Schumacher and Dr. Barkan. Dr. Barkan's testimony was taken without benefit of cross-examination.

Dr. Paul Ziegler, the physician on the vessel and the one who actually attended Lubinski, also testified by deposition, which deposition was taken on behalf of the appellant United States of America. At the time of the trial, appellant failed to introduce or offer Dr. Ziegler's deposition in evidence, and it was thereupon offered and introduced by appellee as part of his case in chief (497) after appellant had rested, pursuant to a motion to re-open his case for that purpose.

Dr. Dorman testified, without qualification, that the exposure to the chemical fumes of the smoke bomb

was the proximate cause of Lubinski's eye condition (125, 127, 128). This irritation set up a process within the eye which resulted in the loss of sight.

Dr. Dorman testified as to the personal history given him by Lubinski and the result of his two examinations with reference to the condition of his eye, indicating in some detail the nature of the examination. He found that the vision of the left eye was limited to light perception only (119), which was the first step of complete and total blindness. This was due to a swelling of the lining membrane of the cornea (120), causing the iris to bulge forward and increasing the intraocular pressure. This is a condition found only in a severe type of iritis, the devastating, destructive type of iritis (121).

In comparing the results of the two examinations which he had made, the first in March of 1944 and the second a day before the trial in January, 1945, he found that there had been some changes in the eye in that the iris was becoming thin and atrophic from lack of use (122), and that Lubinski was wearing a cloth patch over his eye because the eye had become sensitive to cold and temperature changes. This might cause a spasm of the vessels, and a pain which might retreat to that side of the head (123).

Dr. Dorman testified that it was his conclusion that the injury which Lubinski had received to his eye was amply sufficient cause for the eye condition as he found it (125).

It was also his experience that when an iritis is due to an endogenous cause, such endogenous cause being systematic, the infection causes an involvment of both eyes. If it involves one eye first, as it frequently does, the other eye is involved usually after but a short lapse of time (125). In view of the fact that some eight months had lapsed between the two examinations which he had made of Lubinski, the time was sufficient to have allowed for an involvment of the second eye in the event that the iritis was of an endogenous origin. It was his opinion that Lubinski's present eye condition could very easily and most likely have been the result of the injury which Lubinski sustained in July, 1943 (127).

On cross-examination, he re-stated his position that the origin of the eye condition was the exposure to the smoke bomb (128) and that the irritating properties of the chemical or gas in the smoke was apparent from the fact that it was irritating not only to the eyes, but to the nose and throat (131), and that the moisture of the surface of the eye probably combined with the irritant to set up a chemical reaction (139).

Dr. Paul Ziegler was the physician on the vessel. As above indicated, he was first called by the appellant United States of America. He testified that Lubinski first came to him complaining of intense pain in the left side of his face and an inability to see clearly from the left eye (500). He had no ophthalmoscope on the vessel and for that reason was unable to make a complete and thorough examination of the structures of the interior of the eye. He did, however, find that the eye was inflamed and red, and that there was a conjunctivitis. He also found some discoloration of the iris (501). He treated Lubinski by giving him a hypodermic to relieve the pain and irrigated the eye and used an ointment. Although this relieved the pain, the symptoms of the eye were very little improved and at that time he had light perception only (502). Smoke irritation as a possible cause was called to his attention at the time (503), although the matter of damage to the external part of the eye was difficult to determine because of the accompanying conjunctivitis (503), Dr. Ziegler did suggest to Lubinski that he have himself examined physically as the condition might be the result of some systemic source. At that time Lubinski also had an irritation of his sinuses, which he treated (504).

On cross-examination, he testified that at the time he examined him in the latter part of August, even by

a cursory examination the eye condition was obvious and easily apparent (506), and if such condition existed when he joined the vessel, it would have been readily apparent. In response to a direct question (508), he stated that there was possible probability that some external irritation could have caused the condition which he found in Lubinski's eye. As far as Dr. Ziegler was able to ascertain, Lubinski was apparently in good health when he examined him at that time (510), and he had no systemic condition. At that time, Lubinski gave no history of any systemic condition. He admitted that if the irritant was strong enough to irritate the mucous membrane of the nose and sinus, the eye would be more likely to receive a more severe irritation (515, 516), and that such irritation might set up a secondary condition within the eyeball, because of the activity set in motion by the irritation of the surface (516).

Dr. Schumacher testified on behalf of appellant United States of America by deposition. His testimony was that Lubinski was under his care and the care of the United States Marine Hospital in San Francisco from October 16, 1943, to February 9, 1944. Dr. Schumacher had with him, in response to a *subpoenae duces tecum,* the entire hospital record and report of Lubinski's treatment (488). At the time the deposition was read in evidence at the trial, the hospital record was

introduced as Exhibit 12 (477). Upon Lubinski's entry into the hospital, the hospital diagnosis was a chronic iridocyclitis of the left eye (488). The only history Dr. Schumacher obtained was an exposure to smoke and dust, which caused the inflammation to Lubinski's eye (485). In response to a question by attorneys for the appellant United States of America, Dr. Schumacher gave as his opinion the cause of the condition of Lubinski's eye to be a toxin from an endogenous disease and from injury (491). No place in this examination nor in the hospital record was there any suggestion of any endogenous disease suffered by Lubinski, although complete and thorough examinations were given him. Nevertheless, Dr. Schumacher gave as his opinion that from the history he had received, he did not believe there was any relationship between the exposure to smoke and Lubinski's eye condition.

Dr. Barkan examined Lubinski on November 26, 1943, at the request of the office of Mr. John Black. This examination was made for the purpose of a report to Mr. Black, the attorney for the insurance carrier, and was not made for the purpose of any treatment (403). Dr. Barkan took a history of an exposure in July, 1943, to smoke and fire, followed by swollen eyelids for some ten days and subsequent reduced vision of the left eye (397). At that time, Lubinski attributed

his condition entirely to the July, 1943, incident at Attu, (398). In response to the question as to whether the exposure caused the condition, he stated as his opinion that this was not the cause, because such condition is essentially endogenous and would be precipitated only by an external injury, such as a bruise or contusion of considerable severity (401). There was no appearance on behalf of the libelant at the time of the taking of the deposition and the testimony of Dr. Barkan was without benefit of cross-examination.

In the hypothetical question submitted to both Dr. Barkan and Dr. Schumacher, the nature and extent of the exposure were not given, nor was the fact directed to their attention, nor were they asked concerning the fact that there was no record of any systemic disease in any of the many examinations taken by Lubinski. Nor were they asked to consider that his personal history was entirely negative of any systemic disease.

THE COURT'S DECISION (8)

After hearing the testimony and seeing the witnesses, the court felt that negligence in the stowage of smoke bombs was clearly established, referring to the fact that the bombs were removed from the deck and stowed in the forepeak among the ship's stores. Whether there were any regulations relating to stowage or not, it was obvious to the court that the stowage

of smoke bombs as these in the forepeak, where the containers might be disturbed by persons rightfully using the space and if ignited the smoke and gas would escape from the containers and remain confined in the forepeak space, created a danger which might foreseeably result in harm to some person rightfully going into the forepeak space (9).

The court was convinced by the evidence that Lubinski's eyes were injured at Attu by smoke and gas from the smoke bombs negligently stowed in the forepeak of the vessel (10).

The court also found that Lubinski had made out a case of negligence on the incident of the Kiska fire (10), and that the injuries received by Lubinski on that occasion aggravated the condition resulting from his injuries received at Attu a month earlier.

The court went into and discussed the medical testimony, and commented on the fact that although appellant's medical testimony was to the effect that the injury sustained by Lubinski on board ship did not cause the damage, it was less convincing, because that same testimony offered no proof of any systemic condition or any cause different from that asserted by Lubinski (11), and there was some medical testimony tending to support Lubinski's contention that the smoke bomb injury, aggravated by the water and smoke at Kiska, caused his eye trouble.

The court had in mind this testimony and the examination given Lubinski in an attempt to find the cause of his eye condition, when it commented on the fact that with the aid of modern medical tests and examinations given to Lubinski it could have been certainly ascertained whether Lubinski had any infection in his system; but there was no proof of that at all (11).

The court commented that the testimony of Dr. Morrow carried great weight (as appellant so carefully sets out in its brief on page 53), but continued:

> "but it failed of that convincing power necessary to a conclusion in favor of the theory of systemic infection which his testimony supported." (p. 11).

Dr. Morrow did not testify, nor did any other witness state, that there was any systemic infection to cause the loss of appellee's left eye (12).

The court concluded from a consideration of all of the testimony, lay was well as expert medical, that the injury to Lubinski's eye was caused by smoke and attendant gas injury, and the court felt so convinced by the preponderance of the evidence in the record.

ARGUMENT IN SUPPORT OF JUDGMENT

A.

THE FINDINGS OF FACT OF THE TRIAL COURT ARE ENTITLED TO GREAT WEIGHT WITH THE APPELLATE COURT.

As set forth in the case of *Matson Navigation Co. v. Pope & Talbot,* (C.C.A. 9), 149 F. (2d) 205, the rule is well established that where the testimony in the court

below is partly oral and partly by deposition, the weight to be given to the findings of the trial court is a matter for the sound judgment of the appellate court.

In the case at bar, seven witnesses testified as to the facts concerning the acts of negligence, and of these seven witnesses, the libelant and one witness, Kenney, testified orally before the court. The testimony of the others was introduced by deposition. Where the trial court had before it the principal actor in the controversy, Lubinski, and could observe this testimony, the important nature of this testimony require that the lower court's findings of fact, based upon such oral testimony, be given great consideration by this court and carries substantial weight.

On the question of proximate cause between the negligent acts and the loss of sight in Lubinski's eye, a direct issue was presented to the trial court by the two doctors who testified. These doctors were both questioned by the trial court. The trial court had the benefit of seeing and hearing Lubinski on this issue as well as one of the lay witnesses, Kenney. As appears from the court's decision, the trial court resolved the direct conflict of evidence of the expert opinion in favor of the Libelant, Lubinski. On this issue, therefore, the findings of the trial court are entitled to great weight in this court.

Certainly, sufficient witnesses appeared before the trial court, both in numbers and importance, with relation to the issues before the trial court, as to place the trial court in better position to pass upon the credibility of the facts testified to by these witnesses. The trial court had the benefit of seeing and hearing them testify, and under these circumstances, even though some witnesses testified by deposition, in the exercise of this court's sound discretion, the findings of the trial court must carry great weight with this court.

B.

Negligence Under the Jones Act Is Not to Be Given a Restricted Meaning, but Is to Be Liberally Construed for the Benefit of the Seaman, Who Is Still Treated as a Ward of the Admiralty Court.

Aside from the question of weight to be given to the trial court's finding which we feel is determinative of the issues, re-examination of the evidence *de novo* will support no other conclusion than that announced by the trial court.

Although some question was raised below, and is suggested here, that war conditions and the fact that the cargo was originally stowed by the army, in some way affects appellant's liability, this position is apparently abandoned by the appellant. Appellant cites 50 U. S. C. A. 129 (App. Brf. 13), wherein it is set forth

that the Jones Act is made available to war-time merchant seamen in cases of negligence.

Also abandoned by the appellant is the issue of a claim by Lubinski on a war risk policy. The failure of such defense has not been assigned as error. It was not pleaded in the court below, nor was any evidence introduced in support of the suggested issue, and no argument is made thereon by the appellant United States of America in its brief.

Burnstein, et al. v. United States, (C. C. A. 9) 55 F. (2d) 599.

Coates v. United States, (C. C. A. 9) 59 F. (2d) 173.

Moore v. Tremelling, (C. C. A. 9) 100 F. (2d) 39, 43.

This is an action under the Jones Act. It is an action brought by a seaman on a vessel against his employers for an injury sustained as the proximate result of the failure of his employers to perform their duties toward him.

The measure of that duty and the question of the breach thereof, with relation to the facts of this case, must be determined within the framework of the legislative and controlling judicial pronouncements which define it. These pronouncements call for an approach and a rule of interpretation by the court as the trier of

the facts, which is an essential and integral factor in the determination of the issues. In other words, in the interpretation of the facts, this Court must interpret the issues so as to bring its decision within the spirit as well as the legislative letter of the law, and consider its decision as a part of that legislative purpose to build a free and independent, and therefore a sound, merchant marine. The term "ward of the admiralty", is not a meaningless phrase. Apparently the appellant recognized the same approach, as it refers to the traditional liberality of Congress when legislating for seamen. (App. Brief, p. 13).

This court must also determine the issue of negligence in accordance with the historic attitude of admiralty courts when treating problems involving seamen. In determining that issue, this Court must treat the libelant here as a ward of the admiralty court.

This doctrine and approach has been strengthened and affirmed by unequivocal pronouncements of the Supreme Court of the United States. In *Cortes* v. *Balt. Insular Line,* 287 U S. 367, 1933 A. M. C. 9, an action under the Jones Act, which incorporates the Federal Employers' Liability Act, involved the definition of negligence, the court, speaking through Mr. Justice Cardozo, states:

> "The conditions at sea differ widely from those on land, and the diversity of conditions breeds

diversity of duties. This court has said that 'the ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.' *Robertson v. Baldwin,* 165 U. S. 275, 287. Another court has said: 'The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited.' *Scarff v. Metcalf,* 107 N. Y. 211, 215. Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection." (p. 14).

In the more recent case of *Mardesich, et al. c. Anelich,* (usually referred to as the "Arizona"), 298 U.S. 110, 1936 A.M.C. 627, the court again reviews the liability established under the Jones Act, within the setting of the admiralty system. In holding that the defense of assumption of risk, which was allowed under the Federal Employer's Liability Act (since then removed by Congressional enactment) did not apply to actions by seamen by reason of the historic admiralty principles with relation to seamen's rights, speaking through Mr. Justice Stone, the court states:

"Like considerations, and others to be mentioned, require a like conclusion with respect to the modified and in some respects enlarged liability imported into the maritime law by the Jones Act. The legislation was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. Cf. *Chelentis v. Luckenbach SS. Co., supra.* Its provisions, like

> others of the Merchant Marine Act, of which it is a part, are to be liberally construed to attain that end, see *Cortes vs. Baltimore Insular Line,* 287 U. S. 367,375, 1933 A. M. C 9; *Jamison vs. Encarnacion,* 281 U. S. 635, 639, 1930 A. M. C. 1129; *Alpha S.S. Corp. v. Cain,* 281 U. S. 642, 1930 A. M. C. 1133; *Warner vs. Goltra,* 293 U. S. 155, 157, 160, 1934 A. M. C. 1436, and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part." (p. 634).

In a companion case which follows the "Arizona," *Beadle vs. Spencer,* 298 U. S. 124, 1936 A. M. C. 635, the court rejects an attempt to limit an admiralty doctrine for the benefit of seamen, which was developed as a result of sea service, under the peculiar facts involved in that case. There the vessel was tied to the dock when the injury occurred. This is again indicative of the point of view of approach which is an integral part of this case:

> "Nor do we perceive any adequate ground for judicial relaxation of the admiralty rule, applicable under the Jones Act, that assumption of risk is not a defense to a suit to recover for injury to a seaman resulting from unseaworthiness or defective equipment, because he chances to be in some measure less amenable to the iron discipline of the sea than others who go upon foreign voyages. Even so his freedom to avoid the risk is far from comparable to that of the employee on land where the defense of assumption of risk originated and has been maintained. No such distinction appears to have been recognized in the maritime law. And we discern nothing in the purpose or in the language of the Jones Act or in the rules of liability

which it prescribes to suggest that Congress undertook to introduce such a distinction into the maritime law." (pp. 637, 638.)

It is significant that the trend of the decisions of the Supreme Court of the United States relating to seamen have been to enforce and enlarge their initial rights, which is consistent and within the spirit of the doctrine that seamen are wards of the admiralty court. For example, *O'Donell vs. Great Lakes D. & D. Co.,* 318 U. S. 36, 1943 A. M. C. 149, holds that the rights of a seaman arise from his status as such, and, therefore, an action could be maintained under the Jones Act, even though the injury took place on land.

In *Aguilar vs. Standard Oil of N. J.,* 318 U. S. 274, 1943 A. M. C. 451, the court allowed a recovery for maintenance and cure for an injury occurring on shore leave. This decision by Mr. Justice Rutledge, amply supported by legal precedent, exemplifies the traditional approach to problems relating to seamen. Though the problem there was one relating to maintenance and cure, we quote a portion of the decision showing that approach:

> "Certainly the nature and foundations of the liability require that it be not narrowly confined or whittled down by restrictive and artificial distinctions defeating its broad and beneficial purposes. If leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf." (p. 461).

This Court is squarely in line with this rule of interpretation. In *Sundberg* v. *Washington Fish & Oyster Co.,* 138 F. (2d) 801, 1943 A. M. C. 1337, this Court is quoted as follows:

> "The United States Supreme Court treated the subject of negligence for which a seaman can recover in *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 377, 1933 A. M. C. 9. We quote briefly from the opinion: 'The act for the protection of railroad employees does not define negligence. It leaves that definition to be filled in by the general rules of law applicable to the conditions in which a casualty occurs.'
>
> "In discussing the Federal Employers' Liability Act in an action involving injuries to a stevedore, the Supreme Court declared, *Jamison* vs. *Encarnacion,* 281 U. S. 635, 640, 1930 A. M. C. 1129: 'The Act is not to be narrowed by refined reasoning or for the sake of giving "negligence" a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted * * *'." (pp. 1338, 1339).

The liability for damages imposed upon respondents by the Jones Act, as interpreted by the maritime courts, has been created by Congress for the protection of seamen. The facts of each case must be examined with

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[1]Mr. Justice Frank of the Circuit Court of Appeals for the Second Circuit, in the case of *Hume* v. *Moore-McCormack Lines, Inc.,* 121 F. (2d) 408, 1941 A. M. C. 1079, has examined the relationship of a seaman and his vessel historically, and attempts to discover the rationale of the decisions. The opinion develops the consistent judicial policy relating to seamen, and significally suggests that this policy was based on requirements of national defense. We quote from the opinion:

that purpose in mind, and must be liberally interpreted to effectuate that purpose.

C.

THE EVIDENCE ESTABLISHES THAT THE APPELLANT WAS NEGLIGENT IN PERMITTING THE SMOKE BOMBS TO BE STOWED IN THE FORECASTLE.

The appellant owes a continuous and nondelegable duty to the appellee to supply a safe place to work. A similar duty exists to supply a seaworthy vessel, and this relates not only to the construction of the vessel itself, but the manner of the stowage of cargo for the intended voyage.

Johnson v. *Griffiths S. S. Co* (C. C. A. 9) Fed. 2d—1945 A. M. C. 887.

Pac-American Fisheries v. *Hoof* (C. C. A. 9) 291 Fed. 306, 1923 A. M. C. 1180.

The Diamond Cement (C. C. A. 9) 95 Fed. 2d 738. 1938 A. M. C. 757.

Mahnich v. *Southern S. S. Co.* 321 U. S. 9, 1944 A. M. C. 1.

"With that in mind, we should note an intensely practical influence (especially meaningful for us today) sharply manifesting itself in the early 19th century admiralty decisions relating to seamen, which may give us the answer to our question: there is an explicit recognition of the importance of sea-power as an agency of commerce and of national defense." (p. 1095.)

The evidence is uncontradicted that the customary practice on merchant vessels prohibits the stowage of combustible materials in the forepeak, where the men are required to go for tools and equipment. That this customary practice is in accord with the standards of reasonably prudent operation of a vessel, is apparent without further argument.

The customary and proper procedure requires such materials to be stowed in fireproof lockers, or in a space where there is adequate provision to extinguish a fire automatically, or to confine it if a fire occurs. (53, 54, 55, 75, 141, 142, 144.) The witnesses also testified that it was the primary responsibility of the ship's officers to see that no materials of this nature were stowed in the forepeak. And yet, the first mate of the vessel, John Kristiensen, testifying on behalf of the respondents, stated that the smoke bombs were placed

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"For all that, this point remains: One of the impulses which apparently contributed to the survival of the admiralty doctrine as to seamen was vigorously reenforced by early 19th century events affecting both England and this country. And that stimulus still has vitality. See *Calmar S. S. Corp.* vs. *Taylor,* 303 U. S. 525, 528, 1938 A. M. C. 341, where the court (citing *Harden* vs. *Gordon*Q speaks of "The maintenance of a merchant marine for the commercial service and *maritime defense of the nation* by inducing men to accept employment in an arduous and perilous service." (p. 1096.)

"The legislative policy has been to extend that unique protection; in order to effectuate the Con-

n the forepeak at his orders. (279, 298, 302.) This as done long after the vessel left San Francisco and as in Alaskan waters (277), which still more enfeebles ppellant's attempt to avoid responsibility by inferring hat the Army directed the loading of the vessel in San rancisco. Furthermore, the captain of the vessel urther authorized the placing of this dangerous cargo n the forepeak (236). While Captain Goodwin later stified that the mate was in charge of the stowage of he cargo in the forepeak (246), he stated he did not ven know that the smoke bombs were aboard the vessel the time (247). Sather, the second mate, testified hat normally the forepeak should contain only the osun's supplies (371). All of the foregoing, of ourse, are appellant's witnesses, and the men primarily esponsible for the safety of the vessel and the crew.

Not only was the stowage of the smoke bombs in the orepeak negligent by being contrary to good seaman-

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gressional intention, statutes of that type have been liberally construed to favor the seaman (*Bainbridge* vs. *Merchants and Miners Transp. Co.,* 287 U. S. 278, 1933 A. M. C. 32), who has been called the "ward of the legislature." That the legislative policy, in turn, should perhaps affect the judicial attitude, even as to matters not completely within the boundaries of a statute, was suggested by Mr. Justice Holmes, on Circuit, in *Johnson* vs. *United States,* 163 Fed. 30, 32 (1 CCA, 1908), recently cited and quoted with approval in *Keifer & Keifer* vs. *R. F. C.* 306 U. S. 381, 391, note 4 (1939)." (pp. 1097, 1098.)

ship and the customary practice, but such stowage was in direct violation of the regulations of the Coast Guard and Steamboat Inspection Service relating to the stowage of dangerous cargo.

The applicable regulations in effect at that time, were introduced as appellee's Exhibit 3; a comprehensive series of regulations promulgated for the safety of the ship and crew in handling and stowing dangerous cargo. Despite appellant's half-hearted objection that these regulations did not apply because smoke bombs are not technically ammunition, the court properly overruled the objection and permitted the introduction of the exhibit. Definitions, as set forth in the exhibit, clearly indicate that the bombs involved are covered by the regulations. (Exhibit 3, Definitions 146.25-5, p. 1).

Should there still remain any question concerning the responsibility of the ship's officers for the proper stowage of these bombs, such responsibility is unequivocally established by these regulations, wherein it is provided as follows:

> "During the entire operation of loading ammunition, 'it shall be the responsibility of the master to assign a deck officer of the vessel, who shall be in constant attendance. It shall be this officer's responsibility to see that the provisions of the regulations in this part, in so far as such provisions apply to the vessel, are complied with.'" (Ex. 3, Sec. 146.29-27 p. 6.)

The regulations provide that pyrotechnic stowage shall be given ammunition stowage, (Ex. 3, Sec. 146.29-44 p. 11), as described in Sec. 146.29-42 (Ex. 3 p. 11), which, in turn, provides for stowage in locations as provided in Sec. 146.29-30 (Ex. 3 p. 7). This section permits the stowage of such cargo in a forepeak only under certain conditions:

> "a forecastle, poop or permanent deck house, provided the space is ventilated, and does not contain any 'in use' crew accommodations, nor vessel stores, and can be closed off from traffic while at sea."

Violation of a statutory provision is negligence as a matter of law. It is undisputed that the forepeak did not meet this requirement; it was not closed off from traffic while at sea, it contained vessel stores and was in constant use. The very risk and danger to which this regulation was directed, that of setting off these bombs or starting a fire while someone was looking for stores or supplies or worked about the forepeak, occurred. Appellant's negligence on this point cannot be denied, and the evidence leaves no room for any other conclusion.

D.

THE EVIDENCE ESTABLISHES THAT THE ACT OF SEAMAN UZDADINIS IN KICKING OR THROWING THE SMOKE BOMB WAS NEGLIGENCE.

In actions under the Jones Act, the "fellow servant" doctrine is abolished. The employer is, therefore, liable

for acts of the fellow servant in the course of his employment. The acts of seaman Uzdadinis when he went into the forepeak to get tools for the boatswain, was negligence. He knew that the smoke bombs were stored in the forepeak. The bombs were thrown about in a disorderly condition (170). While looking for his tools, he carelessly kicked a case containing some bombs (171), and tossed it aside. He testified on cross-examination that he tossed one case approximately three feet (177, 179). About four or five minutes after this occurrence, the fire was discovered (172). This latter fact was also corroborated by the testimony of the witness Kenney. The simple statement of these facts shows them to be thoughtless and negligent. That the witness himself felt that he was a causative factor of the fire which followed is readily understandable from the fact that no other person was in the forepeak between the time he was there and the time the fire was discovered (174, 178, 180).

Although there is some suggestion that the armed guard may have been responsible for setting the fire, all the evidence indicates they had left the vessel. The witness Corvia indicated in his deposition that the armed crew had already left the vessel (219).

Appellee Lubinski also testified that the amphibious crew were all through working at the time of the fire (112).

Appellant seems to lay some stress upon the fact that the cap to these bombs was a screw cap, although one of the witnesses testified it was a clip cap. Such facts are wholly immaterial, as the bomb did in fact ignite, and appellant does not dispute this fact. The argument or inference that someone, whoever it may have been, unscrewed the cap means absolutely nothing as far as appellant's liability is concerned. There was a fire with disastrous consequences to appellee, and the fire was caused by a smoke bomb, which should not have been stowed in the forepeak.

The acts of Uzdadinis was in the chain of causation of the negligent acts which caused appellee's injury. No other conclusion can follow from the evidence.

E.

THE APPELLANT WAS NEGLIGENT IN SUPPLYING AN INSUFFICIENT GAS MASK TO THE APPELLEE.

Appellee, as boatswain, was second in command in the disaster or emergency squad. The first mate was first in command. As such, appellee testified that it was his duty to go below, at the time of the first fire, to ascertain the cause of the fire. It was necessary to enter the forepeak at that time. Appellee testified he did not recall whether he was ordered below by the mate, although the witness Kenney testified definitely that the mate ordered Lubinski to enter the forepeak. The

witness Corvia also testified that it was the mate who sent Lubinski below (221). There is no dispute that the first mate was present. As a matter of fact, he testified that Lubinski was given his gas mask (309). The second officer further testified that he helped Lubinski on with the gas mask (372).

Considering the dangerous nature of the cargo, 75% ammunition (234), and that some of it was immediately aft of the forepeak bulkhead, there can be no question but that Lubinski was in the performance of his duty, in the highest sense of the term, in entering the forepeak. His conduct is not to be measured from hindsight and with knowledge of the cause of the fire, but is to be measured by the circumstances at the time he entered the forepeak, alone, with a dense volume of smoke coming therefrom, and where at that time there could only be speculation of the cause and the extent of the fire.

The vessel was carrying inflammable cargo, including chemical bombs of various type. The availability of adequate gas masks to fight the particular type of fire that might occur, considering the nature of the cargo, was the obligation of the ship's officers and operators. Any old type of gas mask, or one that failed to protect the surface of the skin, was not sufficient. There is ample evidence in the record that the gas mask supplied to Lubinski was inadequate. Corvia testified

that when the gas mask was removed from Lubinski, smoke or fumes appeared to lay on his face; that they could be seen because of the distinctive orange color (195, 211), and that Lubinski was rushed over to the side to get some air (195). Lubinski was gagging when the mask was removed from his face. The witness Kenney also testified that the fumes were apparent on Lubinski's face when the gas mask was removed (343). These were old army gas masks (223). There was some evidence by Capt. Goodwin (245) that there were larger gas masks on the vessel, although there is no explanation of why they were not available, or why Lubinski was handed the old army gas mask by the mate. Even the first mate, Kristiensen, testified that the use of the gas mask made him feel as though he were sick (287, 288).

The fact that the second mate used another gas mask, supplied him by a member of the crew (325), and that he testified he felt no ill effects, although he had to come up for a breathing spell (326) does not affect the inference that the one supplied to Lubinski was defective, particularly in the absence of evidence that the masks used by Sather and Lubinski were similar.

Appellant attempted to establish by cross-examination that the gas mask was one of the newer type with a mouthpiece which was inserted in the mouth of the wearer. Appellee, however, testified directly to the con-

trary, that it was the older type of mask with a flutter valve in the base (147).

As gas masks are properly part of the vessel's equipment, improper or insufficient gas masks renders the vessel unseaworthy. As such, they come within the nondelegable and absolute obligation of the vessel to supply seaworthy equipment to meet the needs of the particular voyage. Failure to supply such a gas mask is negligence.

F.

PERMITTING THE FULL FORCE OF THE FIRE HOSE TO STRIKE LUBINSKI AT THE TIME OF THE SECOND FIRE WAS NEGLIGENCE.

Lubinski was in his room at the time the second fire broke out at Kiska on August 15th (68). When the alarm was given, he immediately proceeded to his station, and in the performance of his duties, donned a gas mask and proceeded below in No. 3 hold. While there was smoke billowing out of the hold, it was sufficiently clear so that those standing on deck could generally see the ladder (69, 79, 227). Under these conditions, the men holding the hose were negligent in permitting the full force of the water to strike Lubinski in the face as he was proceeding up the ladder and dislodge the mask he was wearing. There seems to be no dispute but that Lubinski was struck by the water from the hose at the time. Uzdadinis testified that he

saw the boatswain come out of the hold soaking wet (175, 183). Corvia testified that he heard someone yelling and that a couple of mess boys had the nozzle right down on the boatswain. He testified the boatswain was on the ladder coming up, and that the force of the hose was full on his face (200), and that his mask was knocked to one side. Corvia further testified that there were other men standing around while the mess boys held the hose (217), and that if the two men were unable to control the hose, certainly some of the others should have assisted them.

Under the foregoing circumstances, it was negligence to permit the full force of the hose to strike Lubinski in the face, and the trial court's finding on this issue is sustained by the evidence.

G.

THE NEGLIGENCE OF APPELLANT IS THE PROXIMATE CAUSE OF THE APPELLEE'S LOSS OF SIGHT IN HIS LEFT EYE.

Upon one fact, all of the medical testimony is in agreement, and that is that at the time of the trial, appellee had a total loss of sight in his left eye. The loss of sight was due to an iridocyclitis, or an inflammatory adhesion between the iris and the lens. This condition is permanent.

All of the medical testimony further agreed that the cause of such a condition is never spontaneous, but that it is due to some systemic infection or from some outside cause or trauma. The trial court had the benefit of hearing two doctors, Dr. Dorman on behalf of appellee, and Dr. Morrow on behalf of appellant. The other doctors called by the appellant all testified by deposition. Dr. Barkan's testimony was without benefit of cross-examination, and Dr. Zeigler, the attending physician of appellee on the vessel, although called on behalf of appellant, after the deposition was taken, appellant refused to offer it in evidence, and it was offered by appellee.

Dr. Dorman testified without qualification, that the exposure to the chemical fumes of the smoke bomb was the proximate cause of appellee's eye condition (125, 127, 128). This injury set up a process within the eye which resulted in the loss of sight. The trial court heard and saw this witness, and there can be no question as to Dr. Dorman's qualifications and the correctness of his opinion. Dr. Dorman had no hesitancy in agreeing with the other medical testimony that a systemic condition within the body could be the cause of the condition, but, in the absence of any evidence of such systemic condition, and appellee's testimony that he had none, it must be concluded that the exposure to the irritant fumes of the smoke bomb was the cause.

The trial court knew, with the facilities available to the appellant, that if the appellee was not telling the truth when he stated that he did not have, and never had had, any of the diseases or illnesses which might be the systemic cause of his eye condition, that appellant would have introduced evidence to the contrary. Appellant had ample opportunity to do so if this was a fact. Appellant did in fact introduce appellee's complete hospital record of the United States Marine Hospital at San Francisco (Ex. A-12). *That record establishes conclusively that appellee did not have any of the diseases which appellant's physicians testified might cause the condition.* Appellee's blood tests, a whole series of them, were negative; the x-rays were negative; his teeth were in excellent condition; and appellee was in excellent health except for the loss of vision. Appellee testified specifically that he never had any of the diseases which were suggested by appellant's doctors as the cause of his loss of vision (520, 421). By the process of elimination, every possible systemic condition that may have caused his loss of vision is shown not to exist. The conclusion is therefore inescapable that the one remaining factor, the injury sustained on the vessel, is the proximate cause of his loss of vision. The opinion of appellant's physicians that the injury did not cause the loss of vision is simply not supported by the facts in the record under their own testimony of causation.

Nor is such opinion buttressed by the lame statement of Dr. Morrow that he did not know what caused libelant's condition in the absence of evidence of systemic disease, but he still did not believe that the injury described was its cause. He admitted under these circumstances that he did not know what was the cause of libelant's eye condition. He did testify, however, that it would be possible for some infection to pass the Canal of Schem, the nerves or open sluiceway close to the surface of the eye, and felt that the eye condition was probably caused by some severe inflammation which followed.

Dr. Dorman's conclusion is amply supported by the evidence. Appellee testified, and it cannot be denied and was not disputed, that he had eye examinations many times prior to the time he joined the vessel (84, 89), and that at the time he joined the vessel he had excellent eyesight, 20-20. Appellee's testimony of irritation to the eye during the period immediately following the fire (66), the immediate treatment on the vessel and care by the vessel's doctor (67), the prognosis of his eye condition during that time (67, 68, 80), the report and treatment by the navy doctor when the vessel arrived in Adak (503), the treatment in Honolulu (81), and the examination and treatment when the vessel returned to San Francisco (83), leads with-

out question to the conclusion that the injury was the causative factor.

Appellee's testimony is corroborated by the testimony of other witnesses. The witness Kenney testified that immediately following the first fire, appellee had trouble with his eye and that he observed his condition—that appellee's eyes were bloodshot, watery and a source of complaint by appellee (345). He also testified that one of the other crew members, a man called "Smokey," also had considerable trouble with his eyes following the fire (345). Kenney went below into the forepeak only once, and as the result of this one exposure his eyes watered and his throat burned (343). Every other member of the crew who came into contact with the gas had similar reaction.

Uzdadinis testified (176, 186) that appellee complained about his eyes a day or so after the fire. Appellee complained and was having trouble with his eye during the voyage (181, 186), and one of the other men had eye trouble (182, 184), and that Uzdadinis felt the irritation in his throat (183). According to this witness, it was obvious that Lubinski had trouble with his eyes (188). At that time appellee stated to the witness that his eye trouble was related to the smoke in the forepeak (189).

Corvia testified that the smoke got all over appellee's eyes and face, and appellee at that time exclaimed how

it started to burn his face and his eyes to water (196, 212). Corvia himself inhaled a mouthful and it caused him to gag and he immediately reported to the doctor (196). Corvia established the bloodshot condition of appellee's eye immediately following the forepeak fire and the continuation of this condition during the remainder of the voyage, and that appellee always had a handkerchief or a piece of waste up to his eyes (198, 202, 224, 225). He also corroborated the fact of appellee's visits to the doctor aboard the ship for treatment (198). Corvia testified that the gas was of such a nature that even a short exposure on the body caused a burning or stinging sensation which lasted quite a while (202). From the date of the fire to the end of the voyage, Lubinski was always having trouble with his eyes; they were always bloodshot and watering, and he required attention for them.

On cross-examination, Corvia testified that when appellee's gas mask was removed he was rushed to the rail and he was gagging, and in the vigorous language of a sailor was complaining of the burning of his eyes (212). An hour after the fire Corvia noticed the condition of appellee's eyes, and they were pretty bad. They were bloodshot, watering (197), and appellee complained about them, and that this condition continued (198).

The first mate, Kristiensen, appellant's witness, also testified as to the effect of the smoke or fumes, that they made him sick, had a terrible smell (287); that appellee complained about his eyes (294, 295).

It was appellant's own witness, Dr. Ziegler, medical officer on the vessel, who supplies the testimony that establishes the casual connection beyond any question. When Lubinski first reported for treatment, he complained of intense pain on the left side of the face, and an inability to see clearly from the left eye (500). The eye was inflamed and red and discoloration was then apparent in the iris (501). Dr. Ziegler gave him an anesthetic for the pain in the eye, which helped the pain but did very little to improve the symptoms of the eye (502). At the time of this visit, Lubinski already had very little vision, which is entirely consistent with the opinion of Dr. Dorman and of the other doctors who testified as to the length of time required for the development of the condition after the injury. Ziegler realized the seriousness of appellee's eye condition, and sent him ashore to an eye specialist when the ship arrived at Adak (502). Even at the time of the first examination, Dr. Ziegler thought it might be possible that the external injury could be the cause of the condition of the eye, although it was difficult to tell because of the accompanying conjunctivitis or inflammation of the lids (503). He also suggested a search for a

systemic cause. Dr. Ziegler further testified that the eye condition was obvious and apparent when he first saw it (506), which is positive corroboration of appellee's testimony that his eyes were in good condition when he joined the vessel. If appellee's eyes were in the same condition when he joined the vessel as they were the first time Dr. Ziegler saw them, it would have been immediately apparent. Dr. Ziegler frankly admitted on cross-examination that with the meagre methods of examination available to him, it would have been possible probably that some external irritant condition could have started the situation (508). He had no hesitancy in testifying that this smoke could have been the causative factor of appellee's eye condition (512, 513, 515). He further testified that he packed Lubinski's sinuses in an attempt to alleviate an irritation of the sinuses, and that smoke sufficient to irritate the mucous membrane of the sinus would have a stronger effect on the mucous surfaces of the eye (516).

Appellant in calling the witness vouches for his integrity. Witnesses are apparently called to establish the facts. The refusal of the appellant to introduce Ziegler's testimony after taking his deposition, certainly permits a strong inference against appellant as to its good faith in presenting all of the facts to the court.

The facts are conclusive. Appellee's loss of sight is permanent, and the cause is either systemic or the result of some external injury to the eyeball. The evidence directly negatives the existence of any systemic condition. There is in the record competent medical testimony that the gas and smoke irritation, as established by the evidence, is sufficient and in all probability did cause the condition.

Without any question concerning the credibility of witnesses who testified before the trial court, this evidence is conclusive that the cause of the loss of Lubinski's vision was the negligence of the appellant. No other conclusion is possible.

ANSWER TO ARGUMENT OF APPELLANT

Appellee's answer to the argument of appellant is largely a discussion of the facts. We shall direct the court's attention to what we feel is the proper answer to the evidence cited or referred to by the appellant, without repeating appellee's argument on the merits.

One of the points made by the appellant was that the cargo was originally stowed by the army (App. Brf., p. 15). We fail to see the materiality of this fact, even assuming it to be true, with the issues involved in this appeal. The undisputed fact is that the smoke bombs were removed from the deck after the ship was at sea, and placed in the forepeak long after the stowage

and loading of the cargo was completed. Whether the cargo was stowed in San Francisco by the Army, was stowed by some private stevedoring company, or by John Jones, has not the remotest relevancy to the issues involved. If the appellant seeks to establish an inference from the fact that the cargo was stowed by the Army that the ship's officers were thereby absolved of all responsibility on the part of the vessel, the testimony of the vessel's officers contradicts this (246, 249, 296), as well as the specific provisions of the Coast Guard regulations, which places upon the officers of the vessel the responsibility of seeing that the dangerous cargo is properly stowed (101).

Appellant makes the argument that it was necessary to stow these signal bombs in the forepeak in order to keep them from deteriorating (App. Brf., p. 17). This argument simply ignores the fact that these signal bombs were part of the equipment of the landing barges, which were stowed on deck, and gives no explanation why they were not stowed within these landing barges. Furthermore, if the vessel's supply of tarpaulins had been adequate, as testified to by the first officer, Kristiensen (298, 299, 300), they could have been covered and left on deck and not stowed in a narrow, confined space. While the officers of the vessel may have wished to cooperate with the Navy amphibious crew, as the appellant suggests, by providing a

place for them to work on their guns (App. Brf., p. 19), in so far as the record appears, work on these guns had absolutely nothing to do with the smoke bombs and the fire at Adak. Appellant does not even make a direct argument on this point, and seek to raise an inference by inuendo.

We do not know upon what authority appellant makes the argument that smoke bombs are not ammunition. Certainly a distress signal of a chemical nature, which is ignited by exposure to the air is as much ammunition as a bomb that is ignited by percussion. The fact that upon ignition the bomb gives forth a smoke or gas, instead of a sudden expanding explosion does not change its character. By the same type of reasoning, a poison gas bomb would not be ammunition. Whatever these distress bombs may be called, their dangerous character is apparent. It is a fair inference that they come within the definition of pyrotechnics in the Coast Guard Regulations. The custom on merchant vessels in connection with the stowage of combustible materials, even paint, indicates the care that must be taken at sea when handling such material.

On the argument made by appellant on the admissibility of the Coast Guard Regulations, appellant erroneously refers to Appellee's Exhibit 3 as being dated October 1, 1943. As a matter of fact, the record shows that Exhibit 3 is dated October 1, 1942 (99), and it was

the prior exhibit, Exhibit 2, which was a subsequent issue of these same regulations, which was dated October 1, 1943, and which was not admitted in evidence. No question can arise as to these regulations being in effect in the summer of 1943 when the vessel was loaded.

The argument made by appellant on the admissibility of the Coast Guard regulations ignores the plain definitions as set forth in the regulations. The very statute cited by appellant, on page 13 of its brief, wherein it is provided merchant seamen employed on Government vessels during war time have the same rights for the enforcement of a claim for personal injuries as "If the seamen were employed on a privately owned and operated American vessel," completely disposes of any argument or objection that this vessel may have been a so-called public vessel and thereby relieved of the obligations imposed by the regulations.

We direct this Court's attention to the fact that the lower court found that there was negligence, whether these regulations were involved or not (9).

Appellant's remaining argument on Finding of Fact III is an attack upon the appellee's expert witnesses on stowage and on the acts of the witness Uzadinis while in the forepeak immediately preceding the fire. These arguments simply state conclusions without any support in the record. On the first point, that of the expert

witnesses on stowage, it is significant that appellant did not call or produce a single witness to the contrary. In the light of the record on this point, the lower court had no alternative but to find that due diligence was not used in the stowage of smoke bombs.

Appellant's argument that the acts of Uzdadinis are an intervening cause and as such cannot be charged to the appellant, because his acts are not foreseeable by the officers, simply ignores the provisions of the Jones Act, which appellant admits governs this case.

It cannot be denied that Uzdadinis was a fellow-servant, and his entrance into the forepeak and actions therein, were in the course of his employment. As such, he is the agent of the employer, the appellant, who is responsible for his acts which result in injury to the appellee.

The principals who are ultimately responsible are not the officers. but the employer. The appellant employed both the officers and the crew, including Uzdadinis and the appellee. No citation of authority is necessary to support this proposition.

Nor is the summary of the testimony of Uzdadinis, as set forth in page 32 of appellant's brief, supported by the extracts of the testimony of Uzdadinis as set forth in appellant's brief. Appellant summarizes the testimony of Uzdadinis that he kicked the carton con-

taining the smoke bomb roughly a foot, and blandly ignores the testimony set forth on page 31 of its brief, where Uzdadinis states that he picked up the case and threw it perhaps three feet on top of another pile.

Whether Uzdadinis' acts be negligence or not, the primary negligence was the improper stowage of these smoke bombs in a place where there was a reasonable likelihood that they would be disturbed or ignited because they were stowed in "in-use" quarters, where the crew were constantly going in and out of the forepeak during the voyage. If through some cause, be it negligent or otherwise, these bombs were ignited by reason of their improper stowage, their effect would be greatly aggravated and become an unnecessary danger to men who might be required to go into the forecastle for the purpose of fighting the fire. They would thereby constitute a great hazard to the vessel and the personnel. The exercise of ordinary care would avoid such hazards to the ship and the personnel.

The lower court, in its memorandum decision (10), answers the argument of appellant on the Kiska fire, when it states "the standard of ordinary care is sufficient to require a fellow crewman to so manipulate a water hose as not to knock from the face or out of position on the face of his fellow employee a gas mask under the circumstances involved at Kiska." There can be no dispute that this is what occurred, as this is the

only testimony of the members of the crew who actually observed the incident as well as the appellee. The ship's officers testified that they did not see what occurred. The court found that these acts of negligence aggravated the injury received in the Attu fire.

It is indeed an astounding statement which appears on page 42 of appellant's brief, that fire at sea is an assumed risk. It is not surprising, therefore, that the two cases cited by appellant in support of this statement have no relevancy to this statement. No further comment is necessary.

The third assignment of error, that the court erred in finding that the appellee's loss of vision was the proximate result of appellant's negligence, has been thoroughly discussed heretofore as part of the appellee's affirmative argument in support of the judgment. To attempt to answer appellant's argument on this point would be but a repitition of the argument heretofore made.

Nor do the isolated excerpts from the testimony of the doctors cited in appellant's brief fairly support the conclusions urged by the appellant.

It is signifiicant that the appellant does not deny that the cause of the iritis is one of two: an injury or the result of some endogenous disease. Appellant makes the erroneous conclusion that the lower court placed

the burden of establishing the cause of the condition upon the appellee, and by inference urges that the appellee has not met the required burden of proof. Appellant entirely overlooks the direct testimony of the appellee that he has always been in good health, that he has been examined and x-rayed time and time again, with negative results, and that there was direct expert testimony that the circumstances of the injury were sufficient to cause, and in all probability did cause, his present condition. Furthermore, it appears from the evidence that the appellee had been under the care of one of the physicians called by the appellant, and time and opportunity had been given and utilized by this physician in an effort to ascertain the cause of appellee's eye condition, other than the injury complained of. These efforts were entirely unsuccessful, and the hospital records introduced by the appellant were entirely negative of any finding of any cause of the loss of vision of appellee's eye. The court had this in mind when it announced its decision relating to the failure of the appellant to prove with the aid of modern medical science any other cause for the loss of sight than the established negligence. Such pronouncement by the court was not placing the burden of establishing the cause of appellee's condition upon appellant, but was a statement of the rule requiring the appellant to

go forward with the proof and meet the proposition established by the appellee's evidence.

> *Southern Ry. Co.* v. *Prescott,* 240 U. S. 632
> *Jefferson Standard Life Ins.* v. *Clemnaer* (C. C. A. 4) 79 Fed. (2) 724

In this the appellant wholly failed, and such obligation is not met by the pious statement that the function of the human body is so mysterious that even post mortem examinations frequently fail to reveal the cause of disease or even death (App. Brf., p. 54).

Modern medical science and the facilities of the United Marine Hospital at San Francisco were used by the appellant's witnesses in their treatment and examination of appellee in an endeavor to establish the cause of his loss of vision other than that testified to by appellee. As the court so aptly observed, there was no proof of any endogenous condition as the cause of the loss of sight. Under these circumstances, no other conclusion than that arrived at by the trial court was possible.

Apparently appellant does not challenge the amount of the judgment, as its only argument on this assignment of error refers to the preceding assignments of error and the arguments thereon, which have heretofore been discussed.

CONCLUSION

This case was tried to the court below on oral testimony and by deposition. There appeared before the court below the appellee and other witnesses, who testified concerning the fundamental issues before the court. The findings of the court on these issues, based on such personal observation, are entitled to a great deal of consideration in this court. Aside from the weight to be given to the lower court's decision, an examination of the record leads to no other conclusion but that the appellant was primarily negligent in permitting the stowage of the distress bombs in the forepeak of the vessel, and the consequential fire was due to the concurrent negligence of the seaman Uzdadinis. The evidence also supports the conclusion that the members of the crew in handling the hose at the time of the Kiska fire acted negligently when they permitted the full force of the hose to strike the appellee in the face.

The evidence is conclusive that these acts of negligence were the direct and proximate cause of the loss of vision of appellee's eye.

The findings of the lower court are amply supported by the evidence, and its judgment, therefore, should be affirmed.

Respectfully submitted,

SAM L. LEVINSON,
Proctor for Appellee.